Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CHRISTIAN GAGNON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 29, 2009

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QUESTION PRESENTED FOR REVIEW

I. DID THE SIXTH CIRCUIT ERR BY AFFIRMING DEFENDANT-APPELLANT'S CONVICTION FOR SIMPLE ASSAULT ON A FEDERAL OFFICER WHERE THE PROSECUTION FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SUPPORT SUCH A CRIME AND THE TRIAL JUDGE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DID NOT SUPPORT A CONVICTION FOR THE CHARGED OFFENSE?

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OPINIONS BELOW

Following a bench trial, on October 10, 2006, United States District Magistrate Judge Donald A. Scheer, Eastern District of Michigan, found Defendant-Appellant guilty of Simple Assault on a Federal Officer. On February 22, 2007, Magistrate Judge Scheer sentenced Mr. Gagnon to serve six (6) months with the Bureau of Prisons.

After trial, Defendant-Appellant filed an appeal as of right with United States District Court Judge George Caram Steeh. Following the parties submissions and the court conducting oral arguments, Judge Steeh affirmed the Defendant-Appellant's conviction for simple assault.

A three judge panel of the Sixth Circuit affirmed Mr. Gagnon's conviction in a published opinion dated January 29, 2009. *United States vs. Gagnon*, 553 F.3d 1021 (C.A. 6, 2009). The Opinion and Judgment are attached as Appendix A and B.

Defendant-Appellant petitions for certiorari to this Honorable Court from the opinion and order affirming his conviction.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Defendant-Appellant Christian Gagnon was charged by way of ticket with Simple Assault on a Federal Officer contrary to 18 U.S.C. § 111 (a) (1). He was convicted of this charge following a bench trial held on October 10, 2006, the Honorable Donald A. Scheer presiding. On February 22, 2007, Magistrate Judge Scheer sentenced Mr. Gagnon to serve six (6) months with the Bureau of Prisons.

After trial, Appellant filed an appeal as of right with United States District Court Judge George Caram Steeh pursuant to Federal Rule of Criminal Procedure 58(g). Following the parties submissions and the Court conducting oral arguments, Judge Steeh affirmed Appellant's misdemeanor conviction for simple assault.

Mr. Gagnon filed a Notice of Appeal on September 18, 2007. A three judge panel of the Sixth Circuit affirmed his conviction in a published decision decided and filed January 29, 2009. *United States vs. Gagnon*, 553 F.3d 1021 (C.A. 6, 2009).

Defendant-Appellant respectfully submits the instant petition for certiorari to this Court from the

Circuit Court's opinion and order affirming his conviction.

REASON FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY AFFIRMED PETITIONER'S CONVICTION FOR SIMPLE ASSAULT, 18 U.S.C. §111, WHERE THE PROSECUTION FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SUPPORT SUCH A CRIME AND THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DID NOT SUPPORT A CONVICTION FOR THE CHARGED OFFENSE.

Mr. Gagnon conviction for Simple Assault on a Federal Officer, contrary to 18 U.S.C. §111, was affirmed by the Sixth Circuit Court of Appeals on January 29, 2009. The instant Petition for Certiorari is necessary to settle a split in the way several Circuit Courts have interpreted this criminal statute and the necessary elements required to sustain a conviction under §111.

In a criminal prosecution, Due Process requires proof beyond a reasonable doubt as to each element of the alleged offense. US Const., Am. V, *In re Winship*, 297 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). Due Process further requires the prosecution to introduce evidence which would justify a rational trier of fact to conclude that he is guilty beyond a reasonable doubt of the charged offense. An acquittal should be entered if sufficient evidence is not introduced during the presentation of proofs.

In the instant case the prosecution failed to carry its burden of proof. There was no competent evidence introduced at trial that Mr. Gagnon committed simple assault. The testimony adduced from the witnesses and the court's findings of fact do not establish that Mr. Gagnon intentionally and forcibly assaulted a federal officer.

Ultimately, Magistrate Judge Scheer ruled that:

> "that the element of forcible resistance, forcible impeding, forcible interference is satisfied in this case. In view of that finding, I will find that the defendant is guilty of the offense charged ..." (TT, 98) (Emphasis Added)

The trial judge's findings of fact and conclusions of law fail to mention anything about the actual charged offense, simple assault. The Government elected to charge and try Defendant-Appellant under the *assault* element. 18 U.S.C. § 111 (a) (1). The salient record of the trial judge's ruling reveals that the court did not find Mr. Gagnon guilty of committing a forcible *assault*. Rather, the trial judge convicted Mr. Gagnon based on uncharged conduct relating to *resisting, impeding and interfering*. These additional verbs, while proscribed by the same statute, cannot form the basis for establishing a conviction for simple assault.

The trial judge was required to specifically find the prosecution had proven the element of forcible *assault* in order to convict Mr. Gagnon. Without such a finding, the crime of simple assault was neither found nor proven and Defendant-Appellant's conviction must be reversed.

As stated above, Due Process requires proof beyond a reasonable doubt as to each element of the alleged offense. Due Process requires that evidence be introduced to justify a rational trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. The statute providing penalties for assaulting, resisting, or impeding certain officers defines three separate offenses, each element of which must be charged in the indictment and proven to the jury [or trier of fact] beyond a reasonable doubt. *United States v. Hathaway,* 318 F.3d 1001 [10th Cir. 2003]. The prosecution and lower court continue to conveniently ignore the holding and dicta of the *Hathaway* case.

In *Hathaway*, supra, the defendant was convicted by a jury of a single count of forcibly assaulting a federal officer in violation of 18 U.S.C. § 111[a]. On appeal Mr. Hathaway asserted the indictment only charged him with a misdemeanor violation of §111 involving simple assault. Relying on *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215 (1999) he argued that since both the indictment and the jury instruction failed to distinguish between simple and non-simple assault he could not be convicted of a felony. The court determined that §111 defined three separate offenses, each element of which must be charged in the indictment and proven to the jury beyond a reasonable doubt. *United States v. Hathaway,* 318 F.3d at 1007. They defined simple assault specifically distinguishing it from non-simple assault and the rest of the statute. The *Hathaway* court was specifically concerned with the possibility of compounding crimes under erroneous interpretations of the statute.

The Court remanded and in doing so specifically pointed out that, "The term 'forcibly assaults' means any deliberate and intentional attempt of threat to inflict physical injury upon another with force or strength when that attempt or threat is coupled with an apparent ability to do so" *Id. at* 1004. The court went on to clarify as the prosecution surmised that, "a forcible assault may be committed by a defendant without actually touching, striking, or doing bodily harm to another, the government must prove that the actions of the defendant were of such a nature to put the person against whom they are directed in fear of an immediate bodily harm." *Id.* at 1005 (Emphasis Added). The court further opined that simple assault is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm. *Id.* at 1008.

In the present case, the lower court made no finding of fact nor conclusion of law with respect to a simple assault, the crime charged. Rather, it focused on the obstruction that allegedly resulted from Mr. Gagnon's conduct. Under the interpretation of the *Hathaway* court the statute actually creates three separate crimes. As Mr. Gagnon was charged with simple assault, then the trial judge's findings of fact must support that charge and not a tangentially related crime, even if that crime springs from the same statute. As previously asserted, the verbiage of *resisting, impeding and interfering*, cannot form the basis for establishing a conviction for simple assault. The trial judge made no findings what-so-ever as to the elements of simple assault. The trial judge never found that any willful attempt to inflict injury had

occurred, that Mr. Gagnon actually had the present ability to inflict such an injury, and that in standing up to reach for his cellular phone that he caused a reasonable apprehension of immediate bodily harm.

Further still, the *Hathaway* court specifically noted that there were three elements to the crime of simple assault none of which were conclusively ruled upon; the willful attempt to inflict injury, ability to inflict injury, and that the actions of the defendant were of such a nature as to put the person against whom they are directed in fear of an immediate bodily harm. In the present case, Mr. Gagnon was seated peacefully in a boat when his cellular phone rang. When he stood up to answer it, he was tackled and put into restraints. Whether he may or may not have resisted being handcuffed is not dispositive here because he was not ticketed-charged with resisting, impeding and interfering, but rather with simple assault. The trial judge never specifically found that any Federal Officer actually had a reasonable apprehension of immediate bodily harm, or that Mr. Gagnon ever made a willful attempt to injure or threaten one of the officers with injury. To the contrary, the Agents testified at trial that they were unsure of whether Mr. Gagnon's phone rang or not, but clearly recalled they were not in fear of their safety when Mr. Gagnon was seated un-handcuffed in the boat.

Interestingly, the alleged assault was directed toward a Border Patrol Agent who did not testify in court. Without this Agent's testimony it would seem impossible for the trial judge to competently rule upon the last element delineated by the *Hathaway* court [apprehension of bodily harm by the person against whom the acts are directed].

Here, the trial judge failed to find even the first element of simple assault had been satisfied by the government. The Magistrate Judge made no specific findings of fact that Mr. Gagnon ever made a willful attempt to inflict injury upon another person. The testifying Agents said they were not in fear of injury while he was un-cuffed on the boat. Only after he was handcuffed did his behavior become erratic. At the point he was handcuffed and put into the police cruiser it is incredulous for the officers to contend that they were still fearful of bodily harm nor did any officers testified to such facts.

Thus, no rational trier of fact could have found from this evidence beyond a reasonable doubt that Appellant committed the crime of simple assault on a federal officer and the ticket should have been dismissed.

The Sixth Circuit addressed the instant case a matter of first impression. The Circuit Court's reasoning and decision is in conflict with *United States v. Chapman*, 528 F.3d 1215 (9th Cir., 2008) (concluding that its construction of § 111 "leaves no room for a conviction that does not involve at least some form of assault"). *Chapman* at 1219. The Sixth Circuit's decision in this case has created a circuit split on the legal issue of whether 18 U.S.C. § 111 is a single offense with three levels of punishment, or multiple offenses.

Other circuits have unanimously held that the statute created three separate crimes whose elements must all be submitted to the fact finder, rather than as a single crime with separate punishments. Those three crimes are: (1) "simple assault" (misdemeanor);

(2) violations of § 111 that either involve a dealy or dangerous weapon or result in bodily injury (aggravated felony); or (3) "all other cases" (felony). *Hathaway*, 318 F.3d 1001, 1007, *Chapman*, 528 F.3d 1215, 1219.

The Sixth Circuit erroneously disagrees with the above interpretation of § 111. Rather, the court held that "misdemeanor "simple assaults" under § 111 refer to cases where a defendant has forcibly performed one of the prohibited actions of § 111(a) without forcibly or intentionally creating physical conduct himself and without the intent to commit a serious felony." The Circuit Court further opined that "congress left much open with § 111 – particularly when it carved into it a murky distinction between "simple assaults" and "all other cases." For this reason, and the Circuit split, on the instant legal issue, this Honorable Court should resolve the confusion by granting certiorari.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, Defendant-Appellant asks this Honorable Court to grant certiorari in this case and reverse the Court of Appeals Opinion and Order affirming Defendant-Appellant's conviction.

Respectfully submitted,

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Dated: April 29, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2133

[Filed January 29, 2009]

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
CHRISTIAN GAGNON, *Defendant-Appellant.*	)

OPINION

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 07-50199—George C. Steeh, District Judge.

Argued: December 9, 2008

Decided and Filed: January 29, 2009

Before: MARTIN and McKEAGUE, Circuit Judges; COLLIER, Chief District Judge.*

COUNSEL

ARGUED: Joseph A. Niskar, Detroit, Michigan, for Appellant. Kevin M. Mulcahy, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee. **ON BRIEF:** Joseph A. Niskar, Detroit, Michigan, for Appellant. Ross MacKenzie, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

BOYCE F. MARTIN, JR., Circuit Judge. This case turns on the surprisingly vexing determination of what distinguishes a "simple assault" from "all other cases" under 18 U.S.C. § 111, which imposes punishment on anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" certain federal officers and employees. Defendant Christian Gagnon argues that his conviction was improper because the magistrate judge did not find that he committed "assault" and instead only found that he forcibly resisted, impeded, and interfered with an officer. But, because § 111 expressly prohibits more conduct than merely the commission of common-law assault, we affirm.

I.

In June 2006, after a security guard at a marina in St. Clair Shores, Michigan identified Christian Gagnon

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* The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

as possibly having immigration status problems, federal Border Patrol Agents confronted him. Gagnon, a Canadian citizen, had been drinking – he testified to having had at least "six beers," "a cocktail," and "another beer" – and he did not have his immigration documents with him. He searched the boat cabin for his passport and called his fiancée for help, but was unable to locate it. The agents, concerned that he was improperly within the country, called their superior to request a notice for Gagnon to appear before an immigration judge. While loud music played in the background, one agent observed Gagnon "suddenly jump up" and testified later that he had feared that Gagnon might attack. The agents tried to force Gagnon to sit down, he resisted, and they handcuffed him. After a somewhat tumultuous back and forth, the agents loaded Gagnon into the back of their Border Patrol vehicle. They asserted that Gagnon made himself vomit by sticking his finger down his throat (Gagnon stated that his stomach was upset from drinking alcohol), and the agents alleged that Gagnon spit at them through the vehicle's security screen between "five and ten times" while continually yelling obscenities.

This encounter crescendoed the next day when one of the agents issued Gagnon a citation notice charging him with a violation of 18 U.S.C. § 111. The parties agreed to proceed with the matter as a Class B misdemeanor charge (and thus the government was not required to file an information and there was no formal indictment), and Gagnon was convicted of a misdemeanor following a bench trial before a magistrate judge. The magistrate judge sentenced him to six months in prison given his Guidelines range. The district court affirmed.

II.

Our jurisdiction can neither be waived nor assumed. A defendant may not appeal directly from a magistrate's judgment to the court of appeals, but rather must appeal to the district court. 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2). And, although there is no provision that expressly allows a defendant to appeal from a district court's judgment affirming a conviction by a magistrate, 18 U.S.C. § 1291 grants appellate courts the authority to entertain appeals from "all final decisions of the district courts." So this language includes final district court adjudications of appeals from misdemeanor trials by magistrate judges. *See, e.g.,United States v. Aslam*, 936 F.2d 751, 754 (2d Cir. 1991). Indeed, such appeals have routinely been allowed, *see, e.g., United States v. Forcellati*, 610 F.2d 25, 30 (1st Cir. 1979), and there is little reason to refuse Gagnon's appeal for prudential reasons because Gagnon appeals a conviction that resulted in jailtime and criminal trials before magistrates ought to be encouraged.

III.

Before getting to the primary question in this appeal, we must first address a structural point of first impression in this Circuit. Although 18 U.S.C. § 111[1]

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[1] Section 111 provides:

In general.– Whoever–

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [designated federal officer or employee] while engaged in or on account of the performance of official duties; or

appears to set out a single offense with three levels of punishment to be imposed depending on the finding of certain sentencing elements, the Supreme Court has instructed that statutes with this type of structure in fact set forth separate crimes whose elements all must be proven to a jury. In *Jones v. United States*, 526 U.S. 227, 252 (1999), the Court construed the federal carjacking statute -- which also begins with a general offense provision and is followed by provisions defining levels of punishment based on varying criteria – and held that it defines separate crimes and that the factors leading to higher punishment must be considered elements of crimes and not sentencing enhancements. *Id.* This construction was necessary to avoid constitutional problems that would arise if elements of crimes were re-labeled "sentencing factors": Congress may not circumvent the constitutional requirement that elements of crimes

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(2) forcibly assaults or intimidates any person who formerly served as a [designated federal officer or employee] on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.–Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 111.

must be submitted to a jury and proven beyond a reasonable doubt by re-labeling them "sentencing enhancements." *Id.* Imagine the problems if Congress created a statute entitled "theft" that distinguished between petty theft and violent burglaries on the basis of "sentencing enhancements" not submitted to juries or proven beyond a reasonable doubt.

In any event, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) – which was decided after *Jones* and held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" – makes it indisputable that § 111 too must be treated as creating three separate crimes whose elements must all be submitted to a jury rather than as a single crime with three separate punishments determined on the basis of sentencing factors submitted to a judge. Those three crimes are: (1) "simple assault" (misdemeanor); (2) violations of § 111 that either involve a deadly or dangerous weapon or result in bodily injury (aggravated felony); or (3) "all other cases" (felony). 18 U.S.C. § 111(a)(b). Our sister courts of appeals are unanimous on this point. *See, e.g.*, *United States v. Vallery*, 437 F.3d 626, 630 (7th Cir. 2006); *United States v. Ramirez*, 233 F.3d 318, 321 (5th Cir. 2000) (overruled on other grounds by *United States v. Cotton*, 535 U.S. 625 (2002)).

IV.

So we turn to the primary question here: what is the difference between "simple assault" and "all other cases" under 18 U.S.C. § 111? Section 111 – titled, "Assaulting, resisting, or impeding certain officers or employees" – has two parts. The first prohibits

"forcibly assault[ing], resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" certain active federal officers or employees and "forcibly assault[ing] or intimadat[ing]" former officers or employees. 18 U.S.C. § 111(a)(1)-(2). The second part sets out three levels of punishment for offenders: The first provides that anyone who violates § 111 and uses a deadly or dangerous weapon or inflicts bodily injury is guilty of a felony punishable by up to twenty years in jail; *id.* at § 111(b); the second provides that anyone who commits "only simple assault" is guilty of a misdemeanor punishable by up to a year in prison and a possible fine, *id.* at § 111(a); and the third provides that "in all other cases," a defendant is guilty of a felony punishable by up to eight years in prison and a possible fine. *Id.*[2]

The difficulty concerns how to distinguish between cases involving "only simple assault" from "all other cases." There is no obvious answer. The statute does not define "simple assault" and neither is it defined elsewhere in the U.S. Code. And, while § 111(a)(1) prohibits six different actions (forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering, with assault being but one), the punishment level clauses, by contrast, distinguish between misdemeanors and felonies solely in terms of "assault." Before turning to the government's

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[2] Congress recently amended § 111(a) as a part of the Court Security Improvement Act of 2007, effective January 7, 2008. *See* Pub. L. No. 110-177, § 208(b), 121 Stat. 2538 (2008). The amended version of the statute is not before the Court in this case, and in any event the amendments do not directly resolve the ambiguity at issue here.

interpretation distinguishing "simple assaults" from "all other cases," we begin with Gagnon's.

A.

At the close of the bench trial, the magistrate judge stated:

> The statute proscribes the forcible assault, resisting, opposing, impeding, intimidating or interfering with any person which [sic] engaged in or on account of the performance of official duties. The official duties element is conceded based upon the testimony, and in view of the defendant's admitted consumption of substantial alcohol, I am satisfied that – that *the element of forcible resistance, forcible impeding, forcible interference is satisfied in this case*. In view of that finding, I will find that the defendant is guilty of the offense charged and enter a finding to that effect.

J.A. 102 (emphasis added). Gagnon argues that these findings were insufficient to support his conviction. Although styled as a sufficiency-of-the-evidence challenge, the real question here concerns how this Court should interpret 18 U.S.C. § 111. This Court "review[s] questions of statutory interpretation de novo." *United States v. Parrett*, 530 F.3d 422, 429 (6th Cir. 2008).

In reliance on the Tenth Circuit's decision in *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003), Gagnon argues that § 111 requires a finding of actual common-law "assault" to sustain any conviction under

§ 111.[3] In *Hathaway*, the Tenth Circuit vacated a felony conviction under § 111 because the government had not alleged or proven the elements of "assault." Specifically, the *Hathaway* court reasoned first that at common law "simple assault" was defined as "either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *Id.* at 1007. Second, the *Hathaway* court observed that when Congress amended § 111 in 1994 to add the phrase "simple assault" and thus create § 111's misdemeanor offense level (previously all violations of § 111 were felonies), *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, it apparently borrowed the phrase from 18 U.S.C. § 113, which prohibits assaults within maritime and territorial jurisdiction. Because § 113 is limited only to "assaults" (and does not list any of the other five actions listed in § 111) the Tenth Circuit reasoned that § 111 too must be limited to prohibiting only common-law assault and nothing else. *Hathaway*, 318 F.3d at 1008-09.

So Gagnon's argument is that *Hathaway* supports his view that the government must prove that the defendant committed an assault and either that there was physical contact or the defendant had the intent to commit murder or another serious felony to sustain

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[3] Although Gagnon heavily relies on *Hathaway* in his brief – and that case counsels in favor of his view – the case that most squarely supports his claim is the Ninth Circuit's opinion in *United States v. Chapman*, 528 F.3d 1215 (9th Cir. 2008).

a felony conviction under § 111.[4] And the Ninth Circuit has explicitly endorsed this view. *United States v. Chapman*, 528 F.3d 1215, 1219 (9th Cir. 2008) (concluding that its construction of § 111 "leaves no room for a conviction that does not involve at least some form of assault"). This has obvious appeal for Gagnon: under this reading, "while a defendant could be charged with resisting, opposing, impeding, intimidating, or interfering, he could not be convicted unless his conduct also amounted to an assault." *Chapman*, 528 F.3d at 1219. Here, the magistrate judge did not find that Gagnon had committed forcible assault against the border patrol officers but instead found that he merely forcibly resisted, impeded, and interfered with them.

But the fatal problem with this reading is that it makes a great deal of what § 111 does say entirely meaningless, which flies in the face of the Supreme Court's repeated instruction that "courts should disfavor interpretations that render language superfluous." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Gagnon's reading disregards five of the six actions Congress specifically delineated and instead collapses the inquiry into a single one: was an assault committed? However appealing this approach might be from a policy perspective or as an easy way to apply a rather convoluted statute, it is nevertheless impermissible as offensive to the statute's text.

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[4] Congress's recent amendment to § 111 approaches this rationale: Assaults are now treated as felonies if they "involve physical contact . . . or the intent to commit another felony." Pub. L. No. 110-77. Nevertheless, Congress's amendment does little to clarify the primary question in this appeal: whether § 111 is limited only to assaults or includes all the actions spelled out in § 111(a).

Congress left much open with § 111 – particularly when it carved into it a murky distinction between "simple assaults" and "all other cases" – but that is no excuse to ignore what it plainly does say.

Congress's drafting makes clear that § 111's purpose is to protect federal officers and certain employees from a broader range of harmful conduct than just common-law assault. If Congress meant only assault it could have said only assault, which is all it said in 18 U.S.C. § 113. Instead, Congress chose to be specific: it named the statute "Assaulting, resisting, or impeding certain officers or employees," and it took the care to include six prohibited actions for active officials in subsection § 111(a)(1) – assaulting, resisting, opposing, impeding, intimidating, and interfering with – and then to cull those six down to two in § 111(a)(2), where it prohibited only forcibly assaulting and intimidating former federal officials. Congress would not have gone to this trouble if all it meant was assault alone. So that reading is unsatisfactory.[5]

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[5] We can also dispose of a hyper-literal approach to § 111. This reading suggests that when Congress amended § 111 to say "simple assault," it meant something like "simpl[y] assault," in that if a defendant committed only assault, and nothing more, then he was guilty of a misdemeanor, but if he committed any of the other five prohibited actions (either alone or in conjunction with an assault) then he was guilty of a felony under the "all other cases" catchall. This reading leads to absurd results: a defendant who assaulted a border patrol officer would be guilty of a misdemeanor (so long as he did not use a deadly weapon or cause bodily injury), while one who passively resisted or impeded such an officer – but did not in any way threaten or cause an apprehension or fear of injury – would be guilty of a felony. Indeed, the incentive would be for suspects to assault agents rather than merely interfere with them, as the law would punish

B.

The better reading of the statute is one we think indicated by the majority of our sister circuits that have addressed § 111 in detail. *See, e.g., United States v. Hazlewood*, 526 F.3d 862 (5th Cir. 2008); *Vallery*, 437 F.3d at 630.[6] Like the Tenth Circuit's approach, the difference between "simple assault" and "all other cases" is determined in light of the common law definition quoted earlier, but this reading also recognizes that when Congress amended § 111 in 1994

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them more severely for their prudence. That cannot be what Congress intended.

[6] These cases, relied on by the government in its brief, did not precisely address the question before us – whether a defendant is guilty of a misdemeanor or nothing at all – and instead addressed a related but slightly distinct one: what actions constitute a felony conviction versus a misdemeanor under § 111(a)? Though not directly controlling, we believe that their rationales support our reading and we therefore disagree with the Ninth Circuit's view, despite it being the only circuit to have directly addressed this precise issue. *Compare Chapman*, 528 F.3d at 1219 ("[W]hile a defendant could be charged with resisting, opposing, impeding, intimidating, or interfering, he could not be convicted unless his conduct also amounted to an assault."), *with Vallery*, 437 F.3d at 633 ("Moreover, in addition to the *plain language* of the statute, case law supports Vallery by stating or implying that the simple assault provision applies to the entirety of § 111(a)") (emphasis added); *Yates*, 304 F.3d 818, 822 (8th Cir. 2002) ("We hold that, in the context of § 111, the definition of simple assault *is conduct in violation of § 111(a)*, which does not [] involve actual physical contact, a dangerous weapon, serious bodily injury, or the intent to commit murder or another serious felony.") (emphasis added); *Ramirez*, 233 F.3d at 322 (holding statutory definition of "all other cases" assault to be "any *physical contact* which by which a person 'forcibly assaults, resists, impedes, intimidates, or interferes with'" a covered officer) (emphasis in original).

it used the phrase "simple assault" as a term of art to incorporate the actions proscribed in § 111(a)(1) and § 111(a)(2). It did so through the common-law lens of "simple assault" as excluding cases involving forcible physical contact or the intent to commit a serious felony.

In other words, the phrase "simple assault" differs from "all other cases" in that "simple assaults" involve the commission of *any* of the prohibited actions listed in § 111(a)(1) and § 111(a)(2), while "all other cases" covers the commission of these same violations *plus* the intent to commit a felony or resulting physical contact from forcible (and thus intentional) action. *See United States v. Kimes*, 246 F.3d 800, 808-09 (6th Cir. 2001) (holding that "forcible" applies to each of the prohibited actions in § 111 and further that intoxication is not a defense because § 111 creates "a general intent crime as to which evidence of diminished capacity is not admissible"). And "simple assault" becomes a term of art that includes the forcible performance of any of the six proscribed actions in § 111(a) *without* the intent to cause physical contact or to commit a serious felony.

Contrary to the Ninth Circuit's assertions, this reading would not make a felony out of cases where a defendant unlawfully resisted a federal agent where "the physical conduct is initiated by the arresting officer rather than the arrestee," *Chapman*, 528 F.3d at 1221, because, in those cases, the arrestee would not have "forcibly" initiated the physical contact and would therefore instead be guilty of only a misdemeanor "simple assault" under the statute. By contrast, if an arrestee resisted or interfered with covered officials by pushing, punching, or headbutting them, for example,

he would be guilty of a felony under the "all other cases" clause.

C.

Having concluded that misdemeanor "simple assaults" under § 111 refer to cases where a defendant has forcibly performed one of the prohibited actions of § 111(a) without forcibly or intentionally creating physical conduct himself and without the intent to commit a serious felony, this case becomes straightforward. The magistrate judge found that Gagnon forcibly resisted, impeded, and interfered with the border patrol agents who attempted to check on his immigration status and detain him. The record fully supports those conclusions on the basis of Gagnon's admitted drunkenness and the magistrate judge's crediting the government's assertions that Gagnon acted defiantly while being detained and taken away.[7] We cannot say that those determinations were error, and they are all that the statute requires.

---

[7] This construction of the statute also avoids the necessity of deciding the timeless question whether spitting a "lugie" towards someone, by itself, constitutes an "assault." *See* Br. for United States at 14 ("Although Gagnon's spittle may not have actually touched [the agent], it is clear . . . that Gagnon was attempting quite seriously to hit him. Given the size of the holes in the security screen a well-aimed lugie could have done the trick. Clearly, this conduct constituted a simple assault.") (citations to the record omitted). We also leave aside for another day the less timeless but no less profound question whether – assuming spitting alone could constitute an assault – a successful spit (one that hit its intended target) creates sufficient "physical contact" under our construction of § 111 to elevate lugie-hurling from misdemeanor "simple assault" into being a felony under the "all other cases" clause.

V.

For the above reasons, we affirm Gagnon's conviction and sentence.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2133

[Filed January 29, 2009]

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

CHRISTIAN GAGNON, Defendant-Appellant.

JUDGMENT

Before: MARTIN and MCKEAGUE, Circuit Judges; COLLIER, Chief District Judge.

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's judgment of conviction and sentence of defendant Christian Gagnon are AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. MI15 H2000051
USM No. 41208-039
Appeal Case No. 07-X-50199

[Filed September 6, 2007]

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

vs.

CHRISTIAN GAGNON,
Defendant/Appellant.

ORDER AFFIRMING DEFENDANT'S FEBRUARY 22, 2007 MISDEMEANOR CONVICTION FOR SIMPLE ASSAULT, 18 U.S.C. § 111(a)(1)

HON. GEORGE CARAM STEEH

For the reasons stated on the record at a September 6, 2007 hearing, Magistrate Judge Donald Scheer's February 22, 2007 decision following a bench trial finding appellant Christian Gagnon guilty of simple assault in violation of 18 U.S.C. § 111(a)(1) is hereby

AFFIRMED. It is hereby ORDERED that the personal bond issued on March 28, 2007 by Magistrate Judge Scheer pending appeal to this court is hereby RESCINDED, and Gagnon's pre-trial bond in Case No. MI15 H2000051, USM No. 41208-039, is hereby REINSTATED. It is further ORDERED that Gagnon shall surrender custody when designated by the United States Bureau of Prisons.

SO ORDERED.

Dated: September 6, 2007

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on September 6, 2007, by electronic and/or ordinary mail.

s/Josephine Chaffee
Deputy Clerk

(2)

No. 08-1486

Supreme Court, U.S.
FILED
AUG 31 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHRISTIAN GAGNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted of a misdemeanor violation of 18 U.S.C. 111(a)(1) on the basis of his physical resistance to being handcuffed and his repeated attempts, while making verbal threats, to spit on officers after sticking his fingers down his throat and vomiting.

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In the Supreme Court of the United States

No. 08-1486

CHRISTIAN GAGNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 553 F.3d 1021.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a-17a) was entered on January 29, 2009. The petition for a writ of certiorari was filed on April 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial before a magistrate judge in the United States District Court for the Eastern District of Michigan, petitioner was convicted of simple assault by forcibly resisting, impeding, and interfering

with federal agents, in violation of 18 U.S.C. 111(a)(1). He was sentenced to six months of imprisonment. The court of appeals affirmed. Pet. App. 1a-15a.

1. At the time of petitioner's crime, Section 111 provided:

> (a) IN GENERAL.—Whoever—
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [designated federal officer or employee] while engaged in or on account of the performance of official duties; or
>
> (2) forcibly assaults or intimidates any person who formerly served as a [designated federal officer or employee] on account of the performance of official duties during such person's term of service,
>
> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.
>
> (b) Enhanced penalty.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 111. In 2008, Congress amended Section 111 by deleting from the penalty provision in subsection (a) the phrase "in all other cases," and substituted the phrase "and where such acts involve physical contact

with the victim of that assault or the intent to commit another felony." See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538.

2. In June 2006, petitioner, a Canadian citizen, was on a boat at a marina in St. Clair Shores, Michigan. After a security guard reported that petitioner had immigration problems, Border Patrol Agents arrived at the marina to interview petitioner. Petitioner, who had been drinking, went into the cabin of the boat to get his passport. At one point, petitioner, who had been sitting down, suddenly "jump[ed] up" which caused one agent to believe that petitioner was about to "attack and push" another agent. Two agents sought to restrain petitioner and tried to get him to sit down so they could handcuff him, but petitioner physically resisted the officers' efforts to force him to sit down. Pet. App. 2a-3a; 10/10/06 Tr. 10, 34-35 (Tr.).

After finally subduing and handcuffing petitioner, the agents took petitioner off the boat, put him in the back of their vehicle, and took him to a Border Patrol station. Enroute, petitioner, seated in the back seat, put his fingers down his throat and repeatedly vomited. He then spat at the agents while yelling obscenities at them and threatening that he was going to kill them. Pet. App. 3a; Tr. 39-42.

3. Petitioner was issued a citation for violating Section 111(a)(1). The parties entered into a stipulation by which they agreed that the case would "proceed as a petty offense constituting a Class B misdemeanor," which limited petitioner's potential punishment to imprisonment for six months and a fine of $5000 and relieved the government of the obligation to file an information, indictment, or complaint. Petitioner also consented to trial and sentencing on the misdemeanor

charge before a magistrate judge. Tr. 4-5; Stipulation to Proceed as Petty Offense; Pet. App. 3a.

After hearing testimony from Border Patrol Agents and petitioner, the magistrate judge found defendant "guilty of the offense charged." Tr. 98. The magistrate judge specifically found that "the element of forcible resistance, forcible impeding, forcible interference is satisfied in this case." *Ibid.* The district court affirmed the conviction. Pet. App. 18a-19a.

4. The court of appeals affirmed. Pet. App. 1a-15a. At the outset, the court agreed with the other courts of appeals to address the issue that, pursuant to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), Section 111's prohibition and punishment provisions "must be treated as creating three separate crimes," which are: "(1) 'simple assault' (misdemeanor); (2) violations of § 111 that either involve a deadly or dangerous weapon or result in bodily injury (aggravated felony); or (3) 'all other cases' (felony)." Pet. App. 6a.

The court rejected petitioner's argument that any conviction under the statute for "resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a federal officer, 18 U.S.C. 111(a)(1), "requires a finding of actual common-law 'assault,'" Pet. App. 8a. The court of appeals acknowledged that the Ninth Circuit had adopted petitioner's reading of the statute in *United States* v. *Chapman*, 528 F.3d 1215 (2008). The court rejected that reading, however, because it "makes a great deal of what § 111 does say entirely meaningless" and would therefore violate the canon against construing a statute in a way that renders words superfluous. Pet. App. 10a (citing *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992)). The court noted that Congress listed five prohibited actions beyond assault in the text of Sec-

tion 111(a)(1), and one prohibited act beyond assault (interfering with an officer) in Section 111(a)(2). *Id.* at 11a. The court concluded that any ambiguity that arose when, in 1994, Congress introduced the distinction between "simple assault" and "all other cases" in Section 111's penalty provision was "no excuse to ignore what [the prohibited conduct language] plainly does say." *Ibid.*

The court also rejected what it termed a "hyper-literal" interpretation of Section 111 under which, of the six forms of conduct prohibited in Section 111(a)(1), only "assault" could qualify as a misdemeanor, whereas the other five types of conduct always come within the "all other cases" category subject to punishment as a felony. Pet. App. 11a n.5. The court regarded that interpretation, under which an assault on an officer could be a misdemeanor but passively resisting arrest would always be a felony, as "lead[ing] to absurd results" that Congress could not have intended. *Ibid.*

The court concluded that the "better reading" of Section 111 was that Congress used the phrase "simple assault," which was added when Congress amended the statute in 1994, as "a term of art that includes the forcible performance of any of the six proscribed actions in § 111(a) *without* the intent to cause physical contact or to commit a serious felony." Pet. App. 12a-13a. The phrase "all other cases," by contrast, "covers the commission of these same violations plus the intent to commit a felony or resulting physical contact from forcible (and thus intentional) action." *Id.* at 13a.

Applying that interpretation to the facts of this case, the Sixth Circuit concluded petitioner violated the statute when he acted "defiantly while being detained and taken away." Pet. App. 14a. In light of its conclusions,

the court declined to resolve the government's alternative argument that petitioner's conduct of spitting his vomit at Border Patrol Agents while shouting that he would kill them would, in any event, qualify as a "simple assault." *Id.* at 14a n.7 (citing Govt. C.A. Br. 14).

ARGUMENT

Petitioner contends (Pet. i, 3-9) that the government's evidence and the district court's findings were insufficient to support his misdemeanor conviction for violating 18 U.S.C. 111(a)(1). That contention lacks merit and would not, in any event, warrant this Court's review. Although the court of appeals' construction of Section 111 does conflict with that of the Ninth Circuit in *United States* v. *Chapman*, 528 F.3d 1215 (2008), that conflict is of little continuing relevance because Congress amended Section 111 in 2008, after the conduct at issue here. The Court should wait to see whether a similar conflict will develop with respect to the amended statute and, if so, to resolve it in the context of a case involving the proper construction of the statute as amended. In any event, petitioner would not prevail even under the Ninth Circuit's approach. The evidence at trial showed that petitioner repeatedly spit vomit at the Border Patrol Agents while threatening to kill them. That conduct qualifies as a "simple assault," even assuming that it is necessary for the government to prove an assault in order to convict petitioner under Section 111. Accordingly, this Court's review of petitioner's misdemeanor conviction under a now-superseded statute is unwarranted.

1. The court of appeals characterized the question presented for its determination as "how to distinguish between cases involving 'only simple assault' from 'all

other cases.'" Pet. App. 7a. That question is of now exceedingly negligible importance in light of Congress's 2008 amendment to Section 111. In that amendment, Congress deleted the phrase "in all other cases" from the statute and thereby eliminated the statutory dichotomy the court of appeals construed. In its place, Congress inserted the phrase "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538. In light of that change to the statutory text, the precise question addressed by the court of appeals in this case can only arise in the small number of prosecutions that might still be pending involving conduct that pre-dated the effective date of the 2008 amendment. Because the precise issue presented here has arisen only infrequently in the past, as evidenced by the extremely narrow circuit split on the issue, this Court's review of the proper construction of the now-superseded version of Section 111(a) is not warranted.

It is, of course, possible that a similar conflict could develop with respect to the construction of Section 111(a) as amended. Although the court of appeals stated that the amendments did not "directly resolve" the issue before it, the court acknowledged that "[t]he amended version of the statute is not before the Court in this case." Pet. App. 7a n.2. Thus, any commentary on the amendment and what significance it might have for construing Section 111(a) was dictum. This Court should wait to see if a conflict does arise and, if so, to resolve the issue in a case involving the new statutory language.

2. Several factors support the court of appeals' interpretation of Section 111(a)(1) to encompass violations that do not involve assault. Section 111(a)(1) identifies

six categories of prohibited conduct: assault and five non-assaultive types of behavior—*i.e.*, where the defendant forcibly "resists, opposes, impedes, intimidates, or interferes with" the federal officer. 18 U.S.C. 111(a)(1). The commas between the verbs and the disjunctive "or" suggest that Congress intended each category of prohibited conduct to be separate and independent of the others. See *Horne* v. *Flores*, 129 S. Ct. 2579, 2597 (2009). And the last five types of conduct are not necessarily sub-categories of assault. Whereas the term assault implies conduct that the suspect initiates against the officer, the other five terms can be satisfied by actions taken by the suspect in response to conduct initiated by the officer.

In addition, one of the statutory predecessors to Section 111 made it an offense to "forcibly resist, oppose, impede, intimidate, or interfere with any [designated official] while engaged in the performance of his official duties, *or* [to] assault him on account of the performance of his official duties." Act of May 18, 1934, ch. 299, § 2, 48 Stat. 781 (18 U.S.C. 254 (1940)). As this Court recognized, that statute was chiefly directed at non-assault crimes and clearly "outlawed more than assaults." *United States* v. *Feola*, 420 U.S. 671, 682 n.17 (1975); *United States* v. *Ladner*, 358 U.S. 169, 176 (1958) (stating that former statute "makes it unlawful not only to assault federal officers engaged on official duty but also forcibly to resist, oppose, impede, intimidate or interfere with such officers. Clearly one may resist, oppose, or impede the officers or interfere with the performance of their duties without placing them in personal danger"). As an example of a non-assault "denounced by the statute," *Ladner* mentioned an act of locking a door to a house to prevent officers from arresting a person inside.

Ibid. And Congress made only a technical change when, as part of the codification of Title 18 in 1948, it placed assault at the beginning of the statute ahead of the non-assault categories of prohibited conduct. *Id.* at 176 n.4 (discussing Reviser's Notes to Act of June 25, 1948, ch. 645, 62 Stat. 688, which recodified provision as Section 111). Not surprisingly, courts upheld non-assault crime convictions under Section 111(a)(1). See, *e.g.*, *United States* v. *Johnson*, 462 F.2d 423, 425 (3d Cir. 1972) (upholding conviction under Section 111(a) for "willfully resisting, opposing, impeding and interfering with federal officers," despite jury's acquittal of defendant on charge of "assault" under that statute), cert. denied, 410 U.S. 937 (1973).

The alteration of Section 111's penalty structure in 1994 introduced the phrase "simple assault" to encompass misdemeanor violations, but Congress gave no indication that it intended to cut back on the substantive reach of the statute. Before 1994, Section 111 punished all offenses by up to three years of imprisonment, except for offenses with a deadly or dangerous weapon, where the penalty was up to ten years. In 1994, Congress amended Section 111(a) by providing that the penalty for acts constituting "simple assault" would be imprisonment for not more than one year, and "all other cases" would be subject to imprisonment up to three years. Congress did not provide a definition of "simple assault." There is no indication, however, that Congress intended the 1994 amendment's creation of a class of misdemeanor violations to narrow Section 111 by eliminating all non-assaultive "resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a federal officer from the statute's scope.

3. Further review by this Court is also unwarranted to resolve any claim of a conflict. Petitioner's reliance on a decision of the Tenth Circuit is misplaced. And there is no reason to believe that petitioner would prevail under the construction of Section 111(a) adopted by the Ninth Circuit in *Chapman*. Under *Chapman*, the government would have to establish an assault, but petitioner would not prevail under that standard because, as the Ninth Circuit has held, spitting at federal officers in an offensive manner *does* qualify as "simple assault." *United States* v. *Lewellyn*, 481 F.3d 695, 697, cert. denied, 128 S. Ct. 154 (2007).

a. Petitioner urges (Pet. 5-7) that the decision below conflicts with the Tenth Circuit's decision in *United States* v. *Hathaway*, 318 F.3d 1001 (2003). That case, however, did not involve the issue presented here. Rather, the Tenth Circuit held that the defendant's conviction for violating Section 111 was punishable only as a misdemeanor instead of a felony because the indictment and the jury instructions failed to distinguish between simple assault and felony assault. Because the indictment failed to allege all of the elements of felony assault—*i.e.*, "actual physical contact, a deadly or dangerous weapon, bodily injury, or the intent to commit murder or [another] felony," *id.* at 1008—and to provide the defendant with sufficient notice that he needed to defend against a felony charge, the defendant could not be convicted of felony assault, *id.* at 1009-1010. The court remanded with directions that the judgment be amended to reflect the defendant's conviction for a misdemeanor. *Id.* at 1010. Because the case involved what was admittedly a "simple assault," *id.* at 1004, 1010, the court did not need to resolve how Section 111(a) would apply to

conduct constituting only one of the five non-assault categories of Section 111(a).

b. Although the court of appeals acknowledged a conflict between its construction of Section 111(a) and that of the Ninth Circuit in *Chapman*, see Pet. App. 10a, it is far from clear that petitioner would prevail even under *Chapman*. As the government argued below, see Govt. C.A. Br. 13-14, petitioner's conduct of spitting his vomit at Border Patrol Agents while threatening to kill them does constitute simple assault, and thus would support petitioner's misdemeanor conviction even if assault is an essential element of every Section 111(a) violation.

In *Chapman*, the Ninth Circuit overturned a misdemeanor conviction under Section 111(a) because the defendant's "nonviolent civil disobedience did not constitute a simple assault." 528 F.3d at 1216. The court of appeals adopted the argument, advanced here by petitioner, that a defendant can be convicted of a misdemeanor under Section 111(a) only for "assaults that do not involve physical contact" and that a defendant charged with "resisting, opposing, impeding, intimidating or interfering * * * could not be convicted unless his conduct *also* amounted to an assault." *Id.* at 1219. To be convicted of a felony under the "all other cases" prong, the court concluded, also "require[s] at least some form of assault." *Id.* at 1221. The Ninth Circuit held that Chapman's misdemeanor conviction could not stand under the court's interpretation of Section 111(a) because the defendant "did not threaten or attempt to injure the officers in any way—he merely stood still, 'tensing' his body." *Id.* at 1219.

In contrast to the facts of *Chapman*, petitioner's conduct in this case *did* qualify as "simple assault" as the Ninth Circuit has construed that phrase. Far from sim-

ply "disobeying [the officer's] orders," as happened in *Chapman*, 528 F.3d at 1222, petitioner threatened to kill the Border Patrol Agents while repeatedly attempting to spit vomit at them. That conduct easily satisfies the requirements of a "simple assault" under Section 111(a). Indeed, even without the aggravating factors of the verbal threat or vomit intermingled with the spit, the Ninth Circuit has held that intentionally and offensively spitting on another person qualifies as a "simple assault" under the theory of assault as an attempted battery. *Lewellyn*, 481 F.3d at 697. See also *United States* v. *Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974) (upholding conviction under 18 U.S.C. 111(a) based on spitting). *Lewellyn* sustained a conviction under 18 U.S.C. 113(a) for "simple assault" based on an incident in which the defendant spat in the face of another on the grounds of a Veterans Administration hospital. 481 F.3d at 696. Although the court was construing a different statute, the relevant phrase—"simple assault"—is the same as appears in Section 111(a). Indeed, in *Hathaway*, on which petitioner relies, the Tenth Circuit expressly relied on the courts' construction of "simple assault" in Section 113 to guide interpretation of Section 111(a). 318 F.3d at 1008.

The magistrate judge did not expressly rule on whether defendant's conduct constituted "assault" because it found that petitioner's conduct violated other prohibitions in Section 111(a). Tr. 98. Likewise, the Sixth Circuit declined to rule on the government's alternative argument that, if an "assault" is a necessary element of any Section 111(a) conviction, the evidence demonstrated an assault in this case. See Pet. App. 14a n.7. Nevertheless, as demonstrated above, petitioner's misdemeanor conviction would very likely be upheld even

under the Ninth Circuit standard for which he advocates. Because the prospect that petitioner would obtain any benefit from a favorable ruling by this Court on his legal contentions is remote, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2009